Nos. 75-500, 75-509, and 75-513

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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CLIFF ANDERSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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DARNICE T. MALLOWAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

BILLY CECIL DOOLITTLE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-500

CLIFF ANDERSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 75-509

DARNICE T. MALLOWAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 75-513

BILLY CECIL DOOLITTLE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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## OPINIONS BELOW

The opinion of the panel of the court of appeals (Pet. No. 75-500 App. A) is reported at 507 F.2d 1368. The opinion of the court of appeals *en banc* (Pet. No. 75-500 App. B) is reported at 518 F.2d 500.

## JURISDICTION

The judgment of the court of appeals *en banc* was entered on September 2, 1975. The petitions for a writ of certiorari were filed on October 1 and October 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the application for an order authorizing telephone interception sufficiently identified those whose communications were to be intercepted, and, if not, whether evidence obtained pursuant to the order should be suppressed.

2. Whether the application for the order authorizing the interception sufficiently established that other investigative procedures were inadequate. (This issue is raised only by petitioners Doolittle, Sanders, Union and Whited.)

## STATEMENT

After a non-jury trial in the United States District Court for the Middle District of Georgia, each petitioner was convicted of conspiring, in violation of 18 U.S.C. 371, to violate 18 U.S.C. 1084 and 1952 by using interstate telephone facilities to carry on an



illegal gambling operation; each petitioner also was convicted of substantive violations of 18 U.S.C. 1952; and petitioner Doolittle was convicted of substantive violations of 18 U.S.C. 1084.[1] A panel of the court of appeals affirmed, with one judge dissenting from the convictions of Anderson, Baxter and Sanders on the ground that failure to name them in the intercept application and order required suppression as to them of the evidence derived from the interceptions (Pet. No. 75-500 App. A). The court of appeals *en banc* affirmed on the basis of the panel opinion, six judges dissenting on the interpretation of the naming requirement (Pet. No. 75-500 App. B).

The undisputed facts are set forth in the district court's special findings (C.A. App. 323-330). Briefly, Doolittle and Sanders were partners in the ownership and operation of the Sportsman's Club in Macon, Georgia, and in the illegal gambling business con-

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[1] Petitioners received the following sentences: Doolittle, one year and one day's imprisonment to be followed by 5 years' probation; Malloway, 9 months' imprisonment to be followed by 5 years' probation; Sanders and Anderson, 6 months' imprisonment to be followed by 5 years' probation; Union and Whited, 5 years' probation.

Co-defendant Frank Joseph Masterana was convicted of conspiracy and substantive violations of 18 U.S.C. 1084 and 1952 and was sentenced to 2 years' imprisonment to be followed by 5 years' probation; co-defendant William E. Baxter was convicted of conspiracy and substantive violations of 18 U.S.C. 1952, and was sentenced to 6 months' imprisonment to be followed by 5 years' probation. The court of appeals affirmed both convictions; Masterana has not filed a petition for a writ of certiorari; on December 2, 1975, Baxter's petition was dismissed pursuant to Rule 60 of the Rules of this Court.

ducted over telephones in the club. Whited and Union were employees of the club who assisted in operating the gambling business. Masterana, who was located in Nevada, supplied line information by telephone to Doolittle, Sanders, Union, and Whited, who transmitted it by intrastate telephone to Malloway, Baxter and Anderson, for use in conducting other illegal gambling businesses.

The evidence was derived from a wire interception authorized on August 21, 1970, by the Chief Judge of the United States District Court for the Middle District of Georgia (C.A. App. 140-144), on the basis of an application made by an Assistant United States Attorney on the same date (C.A. App. 112-117). Both the order and the application specifically identified petitioner Doolittle and "others as yet unknown" as the persons whose communications were to be intercepted.[2]

## ARGUMENT

1. Petitioners contend that evidence derived from the wire interception should have been suppressed because the intercept application and order did not name Sanders, Baxter or Anderson although the government had probable cause to believe that their con-

[2] The order authorized interception over four telephones located in the Sportsman's Club: three were interconnected as a rotary combination, and the other was a pay telephone in a booth (C.A. App. 131). Interception over the pay telephone was limited to times when Doolittle was observed to be inside the club and could be continued only when it was determined by voice recognition that Doolittle himself was using the pay telephone (C.A. App. 142-143).



versations would be overheard. They rely upon 18 U.S.C. 2518(1)(b)(iv), which provides that the application should include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." [3]

a. Only Sanders and Anderson have standing to seek suppression on this basis. Doolittle was identified in both the application and order, and Union, Whited, and Malloway do not claim that they should have been identified in the application or the order. These four petitioners claim only that they are entitled to suppression because of an alleged defect in the application and order relating solely to three other persons. They are thus attempting to assert the rights of others as a basis for suppression of evidence obtained without violation of their own rights. But "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348; see *Brown* v. *United States*, 411 U.S. 223, 229-230. The traditional standing rules were incorporated into the suppression sections of the wire interception statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 91, 106 (1968);

[3] Similarly, 18 U.S.C. 2518(4)(a) requires the order to specify "the identity of the person, if known, whose communications are to be intercepted." This language imposes no broader requirement than the identification provisions of 18 U.S.C. 2518(1)(b)(iv). *United States* v. *Kahn*, 415 U.S. 143, 152.

*Alderman* v. *United States*, 394 U.S. 165, 171-172, 175 n. 9; *United States* v. *Scasino*, 513 F.2d 47 (C.A. 5); *United States* v. *Gibson*, 500 F.2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106. Accordingly, since petitioners Doolittle, Union, Whited and Malloway cannot claim that the omission of an identification of Sanders, Baxter and Anderson violated any rights of theirs, they have no standing to complain of the failure to identify.[4]

b. The question whether Section 2518(1)(b)(iv) requires the government to identify in the application for the intercept order all those who it has probable cause to believe will be overheard using the telephone in the commission of the described offenses is raised by the government's petitions for writs of certiorari

[4] The decision in *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.), is not inconsistent with this conclusion. There, the court found that the failure to inform the authorizing judge that the conversations of one of the targets of the proposed interception had previously been intercepted rendered the entire subsequent interception illegal, since that information might have led to the denial of the authorization for the subsequent interception (*id.* at 838-839). Accordingly, the court concluded that the subsequent communications were "unlawfully intercepted" and subject to suppression on the motion of any "aggrieved person" under 18 U.S.C. 2518(10)(a), including any persons who were parties to the improperly intercepted conversations or against whom the interception was directed, 18 U.S.C. 2510(11). But see *United States* v. *Kilgore*, 524 F.2d 957, 958, n. 1 (C.A. 5). In contrast, here any failure to identify others in the application who might be overheard, when the main target was named, could scarcely have led to the denial of the intercept order and thus did not constitute a significant violation of any mandatory requirement of the Act of the kind involved in *Bellosi*.



in *United States* v. *Bernstein*, No. 74-1486, and *United States* v. *Donovan*, No. 75-212.[5] In those petitions, we argue that the person who must be identified if known is the individual who leases or commonly uses the telephone being monitored, that is, the primary target of the interception. See *Bynum* v. *United States*, No. 74-1445, certiorari denied November 11, 1975, slip op. 1 (dissent from denial of certiorari).

Under that rationale, it was proper in this application and order to identify only Doolittle as the person whose communications were to be intercepted. He was the prime target who was known to be committing the substantive offenses under investigation by means of the telephone to be intercepted (C.A. App. 119-120, 124, 130; R. 522). Although Baxter and Anderson were persons with whom Doolittle could be expected to discuss his illegal activities on the intercepted telephone, that fact does not require that they be named in the application and order. They are precisely similar to the persons who were not named in the applications for the interceptions in *Bernstein* and *Donovan*, who also might have been expected to engage in conversations with the named target over the intercepted telephone.

The situation of Sanders is somewhat different; he was Doolittle's partner in the gambling business and therefore was an alternate user of the intercepted telephones. His situation was thus somewhat closer

[5] We are sending petitioners a copy of our petitions in *Bernstein* and *Donovan*.

to that of Mrs. Kahn, the alternate user of the intercepted telephone in *United States* v. *Kahn*, 415 U.S. 143. But there was no need to name him in the application because he was in no sense a primary target of the investigation. Indeed, he was not known to have been committing the substantive offense (see Section 2518(1)(b)(iv)), since he was not known to have made any interstate telephone calls; he was charged only with conspiracy with the prime target, Doolittle.

c. In any event, Sanders, Baxter and Anderson were all identified in the affidavit supporting the application, which was incorporated by reference into the application itself (C.A. App. 113, 119-137). The affidavit of FBI Agent Gary W. Hart named them, and it clearly set out the information the government possessed regarding their participation in the offenses being investigated; it thus informed the district judge of the strong probability that these persons would be overheard during the intercept (C.A. App. 119-122, 123, 131-135). Therefore, by incorporating the information contained in the affidavit, the application satisfied the reading of Section 2518(1)(b)(iv) urged by petitioners and adopted by the courts of appeals in *Bernstein* and *Donovan*. Cf. *United States* v. *Manfredi*, 488 F.2d 588, 598 (C.A. 2), certiorari denied, 417 U.S. 936.[6]

[6] In *Bernstein* (Pet. No. 74-1486, pp. 15-17), we argue that the congressional policies discussed by the court of appeals in that case are not directly or substantially promoted by the identification in the application of persons other than the principal target of the interception. However, assuming *arguendo* that the court of appeals in *Bernstein* was correct, these purposes were satisfied in this case. In reviewing the intercept papers prior to authorizing the application, the Attorney General was made aware by the affidavit of the evidence implicating Sanders, Anderson, and Baxter (C.A. App. 194-196, 196-197); the issuing judge was informed that there had been no previous electronic surveillance of these three suspects (or of Doolittle) (C.A. App. 115, 137); and all defendants, including these three, received inventory notices of the interception (Pet. No. 75-500, App. A 5a).

Neither Bernstein nor Donovan was named in the affidavits submitted to the court in support of the applications at issue in their cases. The other two individuals involved in the *Donovan* case were simply mentioned in passing in the affidavits.



d. For the foregoing reasons and those contained in our *Bernstein* and *Donovan* petitions, we submit that the court below incorrectly assumed that the application failed to comply with the requirements of 18 U.S.C. 2518(1)(b)(iv).[7] But we also submit that

[7] We recognize that, although under this analysis the application named the others involved in the illegal activities, the order did not, and thus the order technically failed to comply with 18 U.S.C. 2518(4)(a) if the naming of these individuals was required by the statute. But where person are identified in the application, the omission of their names from the order is not a defect justifying suppression, since no congressional policies have been defeated by the omission and the defendants have not been prejudiced thereby. Cf. *United States* v. *Cirillo*, 499 F. 2d 872, 878-880 (C.A. 2), certiorari denied, 419 U.S. 1056. Therefore, the omission of the identities of Sanders, Baxter and Anderson from the intercept order, where they were set out in the application incorporating the affidavit, is not the violation of a statutory requirement which would render the interception unlawful, and hence suppressible, under 18 U.S.C. 2518(10)(a)(ii). *United States* v. *Giordano*, 416 U.S. 505, 527; *United States* v. *Chavez*, 416 U.S. 562, 575-

it was correct in holding that, if there was such a failure, it did not warrant suppression (see our *Bernstein* petition, pp. 12-17).

Nevertheless, since the issue whether the failure to identify a known person in an intercept order is grounds for suppression is before this Court in the government's pending petitions in *Bernstein* and *Donovan*, this Court may wish to hold No. 75-500 (Anderson's petition) and No. 75-513 (with respect to petitioner Sanders only) until it has acted on those petitions. If the Court concludes in those cases that a failure to name a known person warrants suppression of his intercepted conversations, Anderson's and Sanders' claims should be remanded to the court of appeals to determine whether there was such a failure as to them.[8]

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580. Nor would suppression be required under traditional doctrine, since no constitutional rights were violated. The Fourth Amendment does not require that a warrant name the person whose "things [are] to be seized." *Berger* v. *New York*, 388 U.S. 41, 58-59. The things to be seized in this case were, of course, gambling conversations, which were particularly described in the order (C.A. App. 140-142).

[8] We suggested in our *Donovan* petition that *Donovan* was a more suitable vehicle for plenary review by this Court than *Bernstein* (*Donovan* petition, pp. 18-19). We continue to be of that view. We also suggest that *Donovan* is more suitable for plenary review than the instant case, in which the court of appeals assumed, but did not decide, that Sanders and Anderson should have been named. In contrast, the court in *Donovan* considered the serious practical question of who must be identified in an intercept application and order, and thus that case provides a better basis for consideration of that question by this Court. This is reinforced by the point, discussed above, that Anderson and Sanders were effectively "identified" by the affidavit and its incorporation by reference in the application, thus making it unnecessary, in our view, to reach the question of identification in their case.



2. Petitioners Doolittle, Sanders, Union, and Whited contend that the monitored conversations should have been suppressed because the intercept application failed to establish sufficiently the inadequacy of other investigative procedures.

18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia*—

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; * * *.

Similarly, a finding by the issuing judge that alternative investigative procedures are inadequate is a prerequisite for the issuance of an order authorizing electronic surveillance. 18 U.S.C. 2518(3)(c).

The issuing court's finding that "normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used" (C.A. App. 141) was based upon substantial information in the affidavit supporting the application. The three informants upon whose information the affidavit was based stated that they would not be willing to testify in court (C.A. App. 136), and the affidavit made it plain that the information they had provided was not sufficient to prove any particular act of obtaining

line information from Nevada or of dissemination of the line to other bookmakers. The affiant stated that past experience had shown that searches of gamblers and gambling establishments did not suffice to prove the elements of federal offenses being committed (C.A. 136); this statement was corroborated as to Doolittle himself by the information that a prior search of the Sportsman's Club by local police officers had resulted only in a $500 fine for a local offense (C.A. App. 130-131). The affiant explained that additional physical surveillance would not be helpful because an attendant was always on duty at the club, thereby preventing closer surveillance by sight or by overhearing (C.A. App. 135). The affidavit also set out the results of extensive study of telephone records (C.A. App. 126-128, 134); additional use of this investigation technique would not have established the offenses, because telephone records do not reveal the contents of the conversations.

The information in the affidavit sufficiently established the need for electronic surveillance to satisfy the requirement of Section 2518(1)(c). That section "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. "Congress * * * did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. * * * '[T]he statute does not require the government to use a wire tap only as a last resort.'" *United States* v. *Smith*, 519 F.2d 516,



518 (C.A. 9); *United States* v. *Karrigan*, 514 F.2d 35 (C.A. 9), certiorari denied, November 3, 1975, No. 74-1629.[9]

Pertinent decisions have stated, with only minor variation in particulars, the test to be employed in evaluating the nature of the showing required by 18 U.S.C. 2518(1)(c).[10] These decisions teach, in

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[9] Sections 2518(1)(c) and 2518(3)(c) were part of the safeguards included in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to ensure that the statutory authority to conduct eletronic surveillance embodied therein would "be used with restraint and only where the circumstances warrant" such an investigative device. *United States* v. *Giordano*, 416 U.S. 505, 515. Electronic surveillance was "not to be routinely employed as the initial step in criminal investigation" (*ibid.*). On the other hand, the provisions of 18 U.S.C. 2518(1)(c) were obviously not intended to frustrate the use of wire interception as a valid investigative tool by requiring an unreasonably stringent showing of need:

> Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. [Citations omitted.] What the provision envisions is that the showing be tested in a practical and commonsense fashion.

S. Rep. No. 1097, 90th Cong., 2d Sess., p. 101 (1968).

[10] *E.g.*, *United States* v. *Armocida*, 515 F.2d 29, 37-38 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, October 6, 1975, No. 74-6683; *In re Dunn*, 507 F.2d 195, 197 (C.A. 1); *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8); *United States* v. *James*, 494 F.2d 1007 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Curreri*, 388 F. Supp. 607, 618-622 (D. Md.), and cases cited therein.

sum, that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and commonsense fashion—a sufficient factual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner*, C.A. 9, No. 73-2740, decided July 24, 1975, slip op. 7-8. In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein. *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4). He should also weigh the opinions and conclusions of experienced investigators in determining whether to authorize the wire interception. *In re Dunn*, 507 F.2d 195, 197 (C.A. 1). Accordingly, considerable discretion rests with the issuing judge in determining whether the interception is necessary (*United States* v. *Smith*, *supra*, 519 F.2d at 518),[11] and his determination should be accorded substantial weight by the reviewing court (cf. *Jones* v. *United States*, 362 U.S. 257, 270-271).

The affidavit here satisfied the showing required by Section 2518(1)(c) as consistently interpreted by

[11] The issuing judge is, of course, free to request additional information regarding the feasibility of alternative investigative techniques if he is not satisfied with the showing made in the application. See 18 U.S.C. 2518(2).



this Court and the great majority of lower courts that have considered this issue. But petitioners contend (Pet. No. 75-513, p. 11) that the affidavit was inadequate because it failed to satisfy the standard set forth by a panel of the Ninth Circuit in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975.[12] The text of the *Kalustian* opinion (reproduced at Pet. No. 75-513 App. E) was, however, significantly modified by the panel on December 11, 1975 (the opinion as revised is set forth in the Appendix, *infra*), presumably in response to the government's petition for rehearing and suggestion of rehearing *en banc* from the original panel decision in *Kalustian*. The amended version omits the overly stringent standard for assessing compliance with 18 U.S.C. 2518(1)(c) that was contained in the original opinion (Pet. No. 75-513 App. E 8e). Nevertheless, in finding the particular affidavit at issue there inadequate, the *Kalustian* panel still appears to have imposed significantly more stringent requirements for the showing

[12] We point out initially that the application here informed the issuing judge that the offenses being investigated were violations of 18 U.S.C. 1084, prohibiting the transmission by means of an interstate wire facility of gambling information, and 18 U.S.C. 1952, prohibiting the use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (C.A. App. 113). Since the very nature of such crimes tends to make investigative techniques other than interception of the conversations themselves unlikely to succeed, it may be that Section 2518(1)(c) does not require as extensive an independent showing of the inadequacy of other techniques as is necessary when different offenses are involved, such as the violations of 18 U.S.C. 1955 at issue in *Kalustian*.

under Section 2518(1)(c) than Congress intended, or than have previously been required by any of the courts that have interpreted that provision (see note 10, *supra*).[13] We have, accordingly, not withdrawn our petition for rehearing *en banc*, which presently remains pending in the court of appeals.

In cases decided before the original panel decision in *Kalustian*, other panels of the Ninth Circuit have not imposed requirements as stringent as those used in *Kalustian*.[14] We are aware of two other cases presently pending before the Ninth Circuit involving the same issue.[15] In view of these cases, and of our petition for rehearing *en banc* in *Kalustian*, there is a reasonable likelihood that the Ninth Circuit will further clarify its position on the interpretation of Section 2518(1)(c). We therefore suggest that this issue is not now ripe for review by this Court, since the Ninth Circuit has not yet indicated whether *Kalustian* accurately represents its views on the subject.

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[13] The court below did not address the question in this case, but the Fifth Circuit has previously interpreted Section 2518 (1)(c) in accord with the cases other than *Kalustian*. See *United States* v. *Robertson, supra; United States* v. *Pacheco, supra.*

[14] See *United States* v. *Karrigan, supra; United States* v. *Smith, supra; United States* v. *Turner, supra.*

[15] *United States* v. *Pezzino*, No. 75-2305; *United States* v. *Pulliam*, No. 75-1382.



## CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari in Nos. 75-509 and 75-513 (as to all petitioners except Sanders) should be denied and that action on the petitions in No. 75-500 and 75-513 (with respect to petitioner Sanders only) should be deferred until our petitions in *Bernstein* and *Donovan* are acted upon, and then disposed of in accordance with the decisions in those cases.

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JANUARY 1976.

## APPENDIX

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

*v.*

| | |
|---|---|
| KALE KALUSTIAN, | (74-3314) |
| PATRICK DALE POND, | (74-3315) |
| STANLEY NORMAN GRAY, | (74-3305) |
| DAVID SELDITCH, | (74-3264) |
| OTTO VINCENT MARINO, LEOPOLDO OBEZO, | |
| MABLE LINDA CUCCIA, | (74-3265) |

APPELLANTS

## OPINION

Filed Aug. 4, 1975 [*]

*Appeal from the United States District Court for the Central District of California*

Before: ELY and HUFSTEDLER, Circuit Judges, and SKOPIL, District Judge *

SKOPIL, District Judge:

Appellants seek review of their convictions for illegal gambling activities. 18 U.S.C. §§ 1955 and 2. They claim their motions for suppression of evidence

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* Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

[*] As amended December 11, 1975. Bracketed material has been added in amended opinion, and bold face material has been omitted.

were improperly denied. They also argue that there was insufficient evidence to sustain the verdicts.

According to the Government, confidential informants "advised" federal agents in 1971 that defendant Kalustian was operating a bookmaking operation from the Topper Club (Club) in Rosemead, California. Defendants Pond and Marino, among others, were identified as agents for the operation. On December 20, 1971, the Department of Justice sought court orders authorizing wire taps on three telephones at the Club one at defendant Stempke's residence, and one at the residence of Patricia Johnson. The application was authorized by Attorney General John Mitchell and granted on December 20, 1971. 18 U.S.C. § 2518(1)(c) provides that such applications shall include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The Government attempted to fulfill that requirement through affidavits supplied by Special FBI Agent James Brent (Affidavits), which essentially contained the following representations:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity. * * *
> "Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling,



> the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club. * * *
> "Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers

frequently do not keep permanent records. If such records have been maintained, gamblers, immediateiy prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b, and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed; * * *"

Appellants contend that their motions to suppress the wiretap evidence should have been granted because the Government's application did not satisfy 18 U.S.C. § 2518(1)(c). They argue that the supporting affidavits contain bald conclusions rather than facts from which the Attorney General and the judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. § 2518(3)(c).



Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act), 18 U.S.C. §§ 2510 et seq. absolutely prohibits electronic surveillance by the federal government except under carefully defined circumstances and after securing judicial authority. Procedural steps provided in the Act require strict adherence. *United States* v. *Giordano*, 94 S.Ct. 1820, 416 U.S. 505 (1974). The importance of these procedures reflects the dual purpose of Title III, which is to

> "(1) [protect] the privacy of wire and oral communications and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of the wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 2112, 2153 (hereinafter cited as "History").

Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes thought to lie within the province of organized criminal activity. History, pp. 2153-2163. It was designed to conform to prevailing constitutional standards. *Berger* v. *New York*, 388 U.S. 41 (1967); *Katz* v. *United States*, 389 U.S. 347 (1967). The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in *Berger*, *supra*, "Few threats to liberty exist which

are greater than that posed by the use of evesdropping devices." 388 U.S. at 63.

Section 2518(1)(c) of the Act

> "is patterned after traditional search warrant practices and present English procedure in the issuance of warrants to wiretap by the Home Secretatry. [citation omitted] The judgment [of the judge or magistrate] will involve a consideration of all the facts and circumstances. * * * Merely because a normal investigative technique is theoretically possible it does not follow that it is likely. *See Giancana* v. *United States*, 352 F.2d 921 (7th Cir. 1965), cert. denied 382 U.S. 959; *New York* v. *Saperstein*, 2 N.Y. 210, 140 N.E.2d 252 (1957). What the provision envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States* v. *Ventresca*, 380 U.S. 102 (1965)." History, p. 2190.

Our review of the wiretap authorization is limited. We are reminded that

> "[w]here [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States* v. *Ventresca, supra* at 109.

Within our prescribed limits, however, the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been



declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States* v. *Bobo*, 477 F.2d 97 (4th Cir. 1973); *United States* v. *Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *United States* v. *Cox*, 462 F.2d 1293 (8th Cir. 1972). Our review of wiretap orders must ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police". *Ventresca, supra* at 109.

The affidavits set forth facts from which probable cause to infer the operation of a gambling conspiracy could be gleaned. Nearly all of these "facts" trickled into the ears of FBI agents through a series of professional gamblers and bookmakers **moonlighting as stoolies for the Government. This colorful procedure of shuffling through stacks of hearsay and double hearsay reports from the "underworld" to construct an affidavit prompts some intriguing ethical questions.** Unfortunately, as the affidavits attest, none of the Government's underworld informants are willing to testify. [The refusal of the informants to testify is a matter for the court to consider in authorizing electronic surveillance. However, standing alone, it may not be sufficient.] Evidence of the telephone numbers used by the bookmaking operation and the identities of some of the conspirators could not successfully support a prosecution without that testimony.

Consequently the investigating officials decided electronic surveillance was imperative. They discarded

alternative means of further investigation because "knowledge and experience" in investigating other gambling cases convinced them that "normal investigative procedures" were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.

The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wire tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. *These procedures were not to be routinely employed as the initial step in criminal investigation.* Rather, the applicant must state that and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States* v. *Giordano, supra.* (emphasis added)



The Government's position is further undermined by the activity of other crime-fighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes.

**Obviously electronic surveillance can facilitate criminal investigation. Other investigative techniques are usually slower and more difficult. Unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous", however, Title III does not allow wiretapping to replace them.**

**The Government failed in this case to satisfy 18 U.S.C. § 2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A reviewing judge is handicapped without a full and complete statement of underlying circumstances. The Government must (1) inform him of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case. Title III and the individual's right to privacy which it seeks to preserve demand no less.**

[Obviously electronic surveillance can facilitate criminal investigation. Because other investigative techniques are usually slower and more difficult, Con-

gress did not require exhaustion of "all possible" investigative techniques before orders for wiretaps could be issued. *U.S.A. v. Smith*, —— F.2d —— (9th Cir., July 2, 1974). But Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous".

The Government failed in this case to satisfy 18 U.S.C. § 2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances.]

Mere conclusions by the affiant are insufficient to justify a search warrant, *Aguilar* v. *Texas*, *supra*, or a wiretap order. More specifically, they do not provide facts from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.

The trial court's order denying appellants' motions for suppression of electronic surveillance evidence is reversed, and all consolidated cases are remanded for a new trial. All evidence gathered through electronic surveillance pursuant to the original § 2518 order and its extensions shall not be admitted in subsequent proceedings.



**In view of that ruling, the other issues on appeal are not reached.**

**REVERSED and REMANDED.**

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